No.89-1349

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

110-118 RIVERSIDE TENANTS CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The petitioner, 110-118 Riverside Tenants Corporation, ("RTC") respectfully submits this Reply Brief in response to the brief the United States submitted in opposition to the petition for a writ of certiorari.

ARGUMENT

1. The United States, in opposition to the petition, argues that the Second Circuit "looked to New York law" to determine the extent of Broady's interest in the shares of petitioner's stock, Br. p. 6,[1] or more precisely to see whether New York law treated the interest of the cooperative as if it were a secured interest in the nature of a lien.

The fact is, and the reason that the decision below is in conflict with the decisions of this Court, that the court below did not analyze New York law on that issue. One looks in vain for an analysis of New York law

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1 The reference "Br." followed by a number refers to a page number in the brief for the United States in opposition.

in the decision below to determine the nature of the rights between the cooperative and the shareholder, and whether those rights are affected by the filing of a tax lien.

The Court of Appeals cited no New York state law, except to say that there is unity between the shares of stock and the proprietary lease appurtenant to Broady's apartment in reaching its conclusion. A. 10-12.[2] That is where the Court of Appeal's analysis of state law to determine the Apartment Corporation's and the government's competing interest in the proceeds of the sale apartment ended.

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2 The reference "A." followed by a number refers to a page number in petitioner's Appendix annexed to petitioner's original brief submitted herein.

The Second Circuit failed to analyze either Broady's or the apartment corporation's rights under New York law. It either should have analyzed New York law or it should have certified that issue to the New York Court of Appeals.[3] As an alternative to granting this petition, this Court should summarily vacate the decision below, and remand to the Second Circuit with directions to

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3 The Second Circuit did analyze New York law with respect to a tax lien on rights under a contract in Fidelity & Deposit Co. of Maryland v. N.Y.C. Housing Authority, 241 F.2d 142 (2d Cir. 1956), in which the court held that where a contract required payment of certain claims by the contractor as a condition precedent to payment of sums due to it under the contract, the defaulting contractor, and the Government by its tax lien, were only entitled to the net sum due - which conclusion is precisely contrary to the position the Second Circuit took in this case.

certify the issue to the New York Court of Appeals.[4]

The Second Circuit treated petitioner as a lienholder with respect to Broady's interest in the proceeds of the sale of the apartment, but failed to analyze or apply New York law on this issue. The approach of the Court of Appeals directly conflicts with the controlling cases of United States v. Bess, 357 U.S. 51, 78 S.Ct. 1054 (1958); Aquilino v. United States, 363 U.S. 509, 80 S.Ct. 1277 (1960); and United States v. Durham Lumber Co., 363 U.S. 522, 80 S.Ct. 1282 (1960), which all stand for the

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4 See Rules of the Second Circuit, Section 0.27, Rules of the Court of Appeals, Section 500.17 (Certificate of Question of State Law).

proposition that state law creates the property interests and determines their nature - federal law determines only the priority of competing liens.

The court below avoided analyzing New York law by stating that the lien was filed on Broady at a time when he was not in default under his lease. A. 21-22. Thus the court did not analyze what the respective rights of the parties were on default, or what Broady would "ultimately" be entitled to, or whether state law treats the cooperative's interest as a secured interest in the nature of a lien.

This Court has previously rejected the approach - expressly advocated by Justice Harlan in dissent in the Aquilino and Durham cases, 363 U.S. 516, 80 S.Ct. 1285 - that the time of filing a tax lien was material

to the enforcement of the state created rights under a contract. In United States v. Rodgers this Court held that the Government may only "ultimately" collect what the taxpayer is entitled to. 461 U.S. 677, 691, 103 S. Ct. 2132, 2141 (1983).

The approach taken by the Second Circuit Court of Appeals directly conflicted with this Court's rule that state law must be examined to determine the taxpayer's interest in a contract before applying federal lien priorities, as set forth in United States v. Bess, supra; Aquilino v. United States, supra; United States v. Durham Lumber, supra.

What was overlooked by the Government is that if the tax lien had not intervened, and this dispute was

solely between Broady and RTC with respect to the proceeds of the sale of the apartment, there is simply no question that under the proprietary lease, as enforced by New York law, Broady would only be entitled to the net proceeds after his contractual debt to RTC had been paid. See Belton v. Hatch, 109 N.Y. 596 (1888); State Tax Commission v. Shor, 43 N.Y.2d 151, 400 N.Y.S.2d 805, 371 N.E.2d 523 (1977); Banks v. Cox, Treanor & Shaughnessy, 81 A.D.2d 504, 437 N.Y.S.2d 331 (1st Dept 1981); Accord, Fidelity & Deposit Co. of Maryland v. N.Y.C. Housing Authority, 241 F.2d 142 (2d Cir. 1956).

The Court of Appeals did not hold differently - it simply ignored this issue. Neither the Court of

Appeals, nor the Government in its brief even suggested, much less cited any New York law, that RTC would not have prevailed had the tax lien not intervened.[5]

2. The government incorrectly attempted to distinguish the Chicago Mercantile Exchange v. United States, 840 F.2d 1352 (7th Cir. 1988), case by relying on the Seventh Circuit's dictum that a condominium association rule that prohibited

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5 To the extent that the decision of the District Court held that the terms of the proprietary lease were not binding on the shares, A. 51-52, the Court of Appeals reversed this when it held that under New York law the shares of stock and the proprietary lease were inseparable, and that the rights of the taxpayer were limited by the terms of the proprietary lease. A. 10-13.

membership sales of units until all debts to other members were paid would not have priority over a tax lien. Br. p. 8, n.3. The government's argument incorrectly assumes that a shareholder's interest in the shares of a cooperative apartment corporation and a condominium unit owner's interest in the condominium unit are legal equivalents, and that debts to a third party covered by the condominium rule are the same as debts to the cooperative under the proprietary lease. In fact they are not.

The New York Court of Appeals has expressly held that the a condominium "provides apartment dwellers with a kind of outright ownership of their apartments," and that cooperatives are a less direct

form of apartment "ownership", and concluded: "This conscious choice is not without jurisprudential significance in evaluating the nature of a cooperative 'owners' interests." State Tax Commission v. Shor, 43 N.Y.2d 151, 159, 400 N.Y.S.2d 805, 809 (1977).

The government failed to square the decision below with the Chicago Mercantile condominium dictum since the difference between the nature of condominium unit ownership and cooperative share ownership interests has jurisprudential significance. The Chicago Mercantile condominium dictum does not apply to the debt owed to this cooperative, and is not a basis for distinguishing that case. The decision of the court below is in direct conflict with that decision.

CONCLUSION

The petition for a writ of certiorari should be granted, or in the alternative the decision below should be summarily vacated and remanded with directions that the issue of RTC's interest in the proceeds of the sale be certified to the New York Court of Appeals.

Dated: New York, New York
May 21, 1990

Respectfully submitted,

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